U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 1 1 2009

SRC 08 254 51802

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The director later moved to reopen the proceeding and allow the petitioner an opportunity to submit additional evidence. The director then denied the petition a second time. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a podiatrist. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and copies of witness letters.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the petition on August 20, 2008. In a letter submitted with the initial filing of the petition, the petitioner stated:

> I am a Podiatrist . . . and I intend to work in DeRidder, Louisiana, to serve the podiatric needs of this and the surrounding communities, including the many veterans returning to Fort Polk from Afghanistan and Iraq. My training makes me uniquely well qualified to provide the medical care they need. Accordingly, my work is in the national interest. . . .

> Soldiers suffer from many Podiatric problems. . . . The stress on a soldier's feet and ankles is quite similar to that experienced by athletes, and they suffer similar podiatric problems.
>
> This employment is clearly in an area of substantial intrinsic merit. Healthy feet and ankles are clearly essential to a person's well being, and serving the Podiatric medical needs of US soldiers returning from combat duty in Afghanistan and Iraq is certainly an area of substantial intrinsic merit.
>
> Second, the benefit of my work in DeRidder is national in scope. Improving Podiatric these communities and for the soldiers clearly has a national benefit. . . .
>
> The Podiatric care that they receive has a direct and significant impact upon this country's military operations in Afghanistan and Iraq, enabling these brave soldiers to return to duty at posts around the world and across the US, or allowing them to return to productive, happy civilian lives throughout this country.

The petitioner's assertion regarding the national scope of his work is not persuasive. His impact as a clinical podiatrist would be limited to the patients he personally treats, which is a negligible number on a national level, whether those patients are soldiers or civilians.

As for why the petitioner would serve the national interest to a greater extent than others in his field, the petitioner states that his training in sports medicine is applicable to military patients because "[t]he Podiatric problems experienced by athletes are quite similar to those of combat soldiers." The petitioner also asserted that he wrote "an important scholarly article that has been accepted for publication in *Podiatry Today*." The petitioner explained that he "found that people with high arch feet were quicker than those with flatter arches. . . . This has obvious important implications in podiatry, athletics, shoe design, etc."

Published scholarly research can have national scope because of the dissemination of research findings. What the petitioner described, however, was not a scientific research study. In the *Podiatry Today* article, the petitioner wrote: "Just to be clear, this connection between arch height and specific athletic abilities is based on anecdotal observation. It is currently not supported by any study published at this time."

Two witness letters accompanied the initial filing of the petition. [redacted] of Barry University School of Podiatric Medicine stated that the petitioner's "skills and abilities greatly exceed those of the average Podiatrist," and claimed "[t]here are fewer than 10 Podiatrists in the entire country with his skills and training in podiatric sports medicine."

[redacted], Commander of Bayne-Jones Army Community Hospital at Fort Polk, stated that the petitioner's "services will be highly beneficial for . . . military personnel" at the site.

The director denied the petition on January 29, 2009, stating that the petitioner had not shown that he "plays a significant role in influencing the field of podiatry." On March 2, 2009, the director reopened the proceeding and afforded the petitioner the opportunity to submit further evidence to support his claims. In response, the petitioner submitted a manuscript entitled "Preliminary Study on the relationship between foot type and Athletic ability," which reports the foot measurements and performance data for thirteen male soccer players. The record contains no evidence that any scholarly journal accepted the petitioner's article for publication, or even that the petitioner submitted the article for consideration.

The petitioner also showed that he gave a half-hour presentation at the 2008 Day of Sports Medicine Seminar at Barry University, Miami, Florida, while he was studying there under a podiatric sports medicine fellowship.

The bulk of the petitioner's response consisted of further witness letters. [redacted] in his second letter, repeated his claim that "fewer than ten people in the entire world . . . have [the petitioner's] **qualifications," but he did not specify what he meant by "qualifications."** Given [redacted] assertion that Barry University has "the only Podiatric Sports Medicine program in the world approved by the Council on Podiatric Medical Education," he may have meant that the petitioner is one of only ten with a particular combination of degrees and training in Barry University's program. [redacted] did not indicate what the petitioner has achieved as a podiatrist that could not have been achieved by a peer with different "qualifications."

[redacted] claimed that the petitioner's "research on the connection between arch height and athletic abilities . . . has far reaching influence on the practice of podiatric sports medicine." [redacted] did not identify any specific signs of this influence, however. His assertions (*i.e.*, "podiatrists can now help to design shoes and other equipment to enhance an athlete's performance") amount to speculation about potential future influence; they do not show that the petitioner's work has already affected the practice of podiatry, sports medicine, or shoe design. We reiterate here that the petitioner himself referred to his findings as "anecdotal" and "preliminary," and there is no evidence that the petitioner's work has ever been subjected to peer review. The record does not support [redacted] **claims of "far reaching** influence."

The assertions of [redacted], an Assistant Professor at Barry University, are similar to [redacted] claims. [redacted] refers to the petitioner's "significant influence [in his] field," his "important research project investigating the correlation of arch height, athletic maneuvering and injury," and the asserted similarity between sports-related and military foot problems.

The petitioner submitted letters from several podiatrists. They all claim that the petitioner is among the best in the field, but they all have close ties to the petitioner. [redacted] of Leesville, Louisiana "fill[s] in for" the petitioner. Assistant Professor [redacted] of the University of Texas Southwestern Medical Center, "was a year ahead of [the petitioner] in the Podiatric Sports Medicine Fellowship of Barry University and The University of Texas Health Science Center San Antonio Podiatric Residency program, which is how I got to know him." [redacted] of

Miami, Florida, is "the staff podiatrist for eight nursing homes and numerous Assisted Living Facilities. Last year [the petitioner] assisted me in one of these nursing facilities with my patients." [redacted] Chief of Podiatry at Central Texas Veterans Healthcare System, "served as the Residency Director for Podiatric Medicine during [the petitioner's] three year training at the University of Texas Health Sciences Center at San Antonio." The subjective opinions of witnesses close to the petitioner cannot be considered authoritative evidence of consensus within the field. Although several witnesses have asserted that the petitioner is among the best-trained in his field, we cannot ignore that these witnesses were the ones who provided that training.

Athletic Trainer and Travel Coordinator for the Miami Heat basketball team, stated:

> While he was a Fellow in Barry University's program, [the petitioner] served the Podiatric needs of the Miami Heat. He did tremendous work for the team, exceeding that which I would have expected from similarly qualified Podiatrists. He helped the athletes prepare for games, treated their podiatric issues, helped to design shoes and insoles to enhance their performance on the court and treated them at the arena, in the clinic and in the operating room.

It is not surprising that a basketball team would be better served by a podiatrist with specialized training in sports medicine than by a podiatrist lacking such training, but this speaks to the value of the training rather than to the petitioner individually. Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *Matter of New York State Dept. of Transportation* at 221.

Assistant Athletic Trainer at the University of Miami, "worked with [the petitioner] who provided podiatric services to the university's athletes." stated that the petitioner provided orthotics that helped an unnamed athlete who "has had various injuries for years that are the result of poor biomechanics."

The director denied the petition on April 6, 2009, stating that while the petitioner has had a successful career thus far, he has not established a degree of influence and impact on his field that would justify a national interest waiver. The director noted that the petitioner's witnesses are concentrated within one geographic region of the United States, and asserted: "Generally, those selected for an NIW waiver [*sic*] have decades of experience."

On appeal, counsel stated that the director "applies an inappropriate standard of review, requiring [the petitioner] to have decades of experience." The director did not state that "decades of experience" were required to qualify for the waiver; the director stated only that aliens who qualified for the waiver tended to be more experienced. This is an observation, rather than a requirement. We will not comment on this observation except to note that the director did not provide statistical data to support the claim. The director appears to have made this observation because the petitioner's claim of wide-

ranging influence rests primarily on a single unpublished manuscript and a preliminary article in which the petitioner admitted that his findings were "anecdotal observations . . . not supported by any study."

Counsel asserts that the petitioner's work is national in scope, because the petitioner's military patients can "better use their feet and ankles in active military duty or in civilian roles across the country." This is not a persuasive argument. Even when a given occupation is of national importance, it does not follow that one alien's work in that occupation is national in scope. The impact of an alien who works with small numbers of people is so attenuated at the national level as to be negligible. *See Matter of New York State Dept. of Transportation* at 217, n.3.

The petitioner can only treat so many patients, and the hypothetical assertion that some of these patients may scatter to other parts of the country does not establish that the petitioner's work is national in scope. Even if the petitioner's patients were to distribute themselves throughout the United States, they would amount to a negligible proportion of the population. Furthermore, once those patients leave the petitioner's vicinity, more than likely, they cease to be his patients. His ongoing impact is limited to the immediate area. If we were to conclude that the petitioner's work is national in scope because his patients might move to other areas, then the "national scope" test would become meaningless, because anyone could meet it simply by stating that their clients, patients, or collaborators might one day relocate.

After the publication of *Matter of New York State Dept. of Transportation*, Congress recognized that clinicians engaged in individual patient care cannot meet the "national scope" test. Congress therefore enacted section 203(b)(2)(B)(ii) of the Act, making the waiver available to certain physicians practicing in medically underserved areas and hospitals administered by the Department of Veterans Affairs. Congress could have expanded this provision to cover other health care workers who come into contact with military personnel, such as podiatrists in the vicinity of military facilities, but did not do so. Therefore, we cannot conclude that Congress created a blanket waiver for podiatrists whose patients include soldiers from nearby installations.

Counsel's arguments on appeal simply repeat previous claims, such as the contention that the petitioner "performed an original and significant research project." The record, however, contains no credible, objective evidence to support the claim that the petitioner's work is more important or influential than that of countless other trained podiatrists. The witnesses who call the petitioner one of the nation's top podiatrists have all worked with him; there is no evidence that this opinion is more widely shared.

The petitioner submits copies of several letters. Most of these letters were submitted previously, the only exception being a letter from [redacted], Dean of the College of Podiatric Medicine at Western University of Health Sciences, Pomona, California. This letter is not evidence of a wider reputation, because states that he used to be the "Podiatry residency program director at University of Texas Health Science Center. . . . During this time, I had the pleasure of working with [the petitioner] on a daily basis." This letter continues the trend in which the people who trained the petitioner praise the high quality of the petitioner's training.

The record establishes little except that the petitioner has clearly impressed those who trained and worked with him. As we have already noted, exceptional ability (a degree of expertise significantly above that ordinarily encountered) is not sufficient grounds for a national interest waiver, but the petitioner has not persuasively exceeded that standard. Witnesses have indicated that the petitioner has the opportunity to influence his field (for example, through research), but the record shows that such influence has yet to manifest itself.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This decision is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.